710E

No. 06-219

In The Supreme Court of the United States

CHARLES WILKIE, ET AL.,

Petitioners,

v.

HARVEY FRANK ROBBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE NEW MEXICO CATTLE GROWERS' ASSOCIATION, NEW MEXICO FEDERAL LANDS COUNCIL, NEW MEXICO WOOL GROWERS, INC., GRANT COUNTY AREA CATTLEGROWER'S ASSOCIATION, COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH AND WYOMING PUBLIC LANDS COALITION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTERESTS OF *AMICI*[1]

Six organizations join in this *Amici Curiae* Brief. The New Mexico Cattle Growers' Association is a non-profit organization with some 1600 members of New Mexico's livestock industry. Its purpose is to promote and protect the interests of its livestock producing members. Many, if not most, of the Association's livestock producer members hold permits or leases to utilize federal lands, including those administered by the Bureau of Land Management ("BLM"), and other public lands for livestock grazing. A large number, if not the majority, of New Mexico ranches include federal or public lands of some sort and grazing of federal or public lands is essential to their operations.

The New Mexico Federal Lands Council is a non-profit organization with approximately 3,500 members who are engaged in the livestock industry. Most of its members graze livestock on federal lands and deal with federal land management agencies on a routine basis. The New Mexico Wool Growers, Inc., is a non-profit corporation which works for the mutual protection and benefit of its members engaged in the wool growing and sheep and goat raising industry. The Grant County (New Mexico) Area Cattlegrower's Association is a non-profit corporation formed to protect and improve the cattle industry. The Coalition of Arizona/New Mexico Counties for Stable

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[1] Pursuant to Supreme Court Rule 37.6, *amici* confirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties. *See* S.Ct.R. 37.3(a).

Economic Growth is a non-profit corporation made up of county governments, businesses, organizations and individuals in Eastern Arizona and Western New Mexico. Its mission is to maintain and increase the economic base which results from federal lands, which are prevalent in each of its member counties, and to protect private property rights of persons and industries dependent on federal lands.

The Wyoming Public Lands Coalition is a coalition of livestock associations and producers in Wyoming. The Coalition works to promote and protect livestock producers and provide range science-based technical assistance to members.

SUMMARY OF ARGUMENT

BLM officials have broad authority to manage public lands in the West and to regulate private uses of those lands. However, their powers are strictly constrained by the laws enacted by Congress to govern grazing and other uses. These regulators must act within the statutory limits, as well as the regulations and policies they themselves promulgate. Ranching in the arid West, and particularly public lands ranching, is substantially different than the raising of livestock in other areas of this nation, and involves unique management among the mix of federal, state, private and other lands that make up a ranch unit. Western ranching is the oldest and most traditional form of livestock production in the nation, and is entering its fifth century.

Amici Curiae urge affirmance of the decision of the Tenth Circuit Court of Appeals.

ARGUMENT

I. BRIEF SUMMARIES OF THE BACKGROUND AND SETTING OF THIS CASE WILL BE HELPFUL TO THE SUPREME COURT IN ANALYZING THE ISSUES PRESENTED

A. A Short History of Livestock Grazing in the American West

What is now the American West was originally occupied by numerous groups of Indian peoples but they did not domesticate and raise livestock until after the arrival of Europeans. Cattle and sheep were initially brought to what is now New Mexico in 1540 by Francisco Vásquez de Coronado. Richard Flint and Shirley Cushing Flint, *The Coronado Expedition to Tierra Nueva, The 1540-1542 Route Across the Southwest*, 6 (1997). Seven thousand head of livestock were permanently introduced, along with horses, to the Southwest by Don Juan de Oñate who established permanent Spanish settlement in northern New Mexico in 1598, years before the English founded Jamestown and the pilgrims landed at Plymouth Rock. Max L. Moorhead, *New Mexico's Royal Road, Trade and Travel on the Chihuahua Trail*, 8 (1958); Marc Simmons, *The Last Conquistador, Juan de Oñate and the Settling of the Far Southwest*, 112-120 (1991). The Western livestock industry thus began in New Mexico and expanded over the years throughout the West.

Livestock from early New Mexico communities grazed on "commons" attached to the villages. Marc Simmons, *Spanish Pathways, Readings in the History of Hispanic New Mexico*, 119 (2001). Community expansion within this isolated Spanish territory occurred due to ranching. "[S]tock raising, instead of farming, propelled most of the Hispanics who expanded their frontiers," and this

"emergent class of stockmen, whose desire it was to add to their grazing lands, led the way." Richard L. Nostrand, *The Hispano Homeland*, 76 (1992). The actions of pioneering families, like the Martinezes of Taos, on the eve of the American occupation of New Mexico, were typical:

> The brothers also expanded their father's ranching operations in new directions, using open range, to which they may or may not have held title, as was the custom.

David J. Weber, *On the Edge of Empire, The Taos Hacienda of Los Martínez*, 73 (1996). As early as 1800, ranchers in New Mexico exported almost 19,000 sheep and over 200 cows several hundred miles south to Chihuahua over the Camino Real. Moorhead, at 45.

The United States acquired from France all or part of the Western states of Colorado, Wyoming and Montana in the 1803 Louisiana Purchase. Four and a half decades later, Mexico ceded California, Nevada, Utah, Arizona, and New Mexico and parts of Colorado and Wyoming to the United States, and the new government guaranteed protection of existing rights in property that were secured by the prior sovereign. Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

After the United States acquired the West, most lands were open to settlement and occupation. George Cameron Coggins and Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 Envtl. L. 1, 3-22 (1982). Rangelands were open to any who wished to use them and the "open range" system was born. *Id.* at 28-31. Use of public lands was encouraged by the federal government in order to encourage expansion and settlement. *Id.* at 3-22. The Homestead

Act of 1862, 43 U.S.C. §§ 161-180 (repealed 1976), was designed to encourage settlement on public lands, but its 160 acres did not work well in the arid West and was completely inadequate for those seeking to make a living by raising livestock. In response to this situation, stockmen would homestead a location that had water and use the surrounding open range for livestock grazing.

> Acquiring a stock range was a simple matter in the early days of the industry before the country became crowded with cattle. It was only necessary to secure title to an available water supply in order to control land for miles around as surely as though that land were actually owned.

Victor Westphall, *The Public Domain in New Mexico, 1854-1891*, 42 (1965).

> Since there was only limited arable land in New Mexico, and that largely occupied [by 1877], the paramount attraction was the pasturelands. The key to their occupancy was water. He who controlled the water controlled all the surrounding lands. Ownership of a few acres with surface water frequently carried with it undisturbed use of thousands of acres of grasslands which were a part of the public domain.

Ira G. Clark, *Water in New Mexico, A History of Its Management and Use*, 48 (1987). This New Mexico experience played itself out in all of the states and territories of the West.

The Mining Act of 1866, 43 U.S.C. § 661, provided that "rights to the use of water" on the public lands which are "recognized and acknowledged by the local customs, laws, and decisions of courts" would be "maintained and protected." This has been interpreted as a federal deferral to

state and local law and custom in matters of water rights. *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 614 (1978). Allowing state water law to control afforded the United States the ability to allow possessory interests to be created on federal lands. Congress "encouraged expansion, exploitation and development of the public lands" in the hope that this would lead to settlement resulting in acquisition or sale of the public domain. *See Wilkenson v. Dep't of the Interior*, 634 F.Supp. 1265, 1275 (D. Colo. 1986).

Since Western stockmen could not homestead and thereby acquire title to the thousands of acres necessary for a viable ranch operation, they generally acquired title to just those essential lands with waters (streams, ponds, springs, etc.). *See* Phillip O. Foss, *Politics and Grass, The Administration of Grazing on the Public Domain*, 26-29 (1960). Using those waters, described by the federal surveyor-general for the Territory of New Mexico as "the nucleus of their stock ranges" (Clark, at 49), stockmen established Western ranches. The early settlers, homesteaders and ranchers then acquired title to the better lands, being those with water and most amenable to settlement. Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth from Myth in the Western Ranching Debate*, 36 Envtl. L. 481, 497 (2006). Over the years, Congress reserved blocks of other public lands for specific purposes, such as Indian homelands, military reservations, and national forests. Yet, millions of acres in the West remained unclaimed for federal reservation for specific purposes or for transfer into private ownership. Coggins, at 20-21. Many of these remaining lands were usable only for range purposes, the grazing of livestock. *Id.* The federal government freely

allowed possessory livestock uses of public lands under the "open range" system throughout the nineteenth century and well into the twentieth. *Id.* at 20-30.

B. A Summary of the Development of Grazing Administration on Federal Lands in the West

The "open range" system worked well until Western ranges became filled with livestock, cattle and sheep competed for the same range, and population increased. Foss, at 34-35. With no restrictions on any individual grazing operator, the numbers of livestock grew significantly. *See Public Lands Council v. Babbitt*, 529 U.S. 728, 731 (2000) (noting that there were over seven million head of cattle in the Great Plains during the 1880's boom). Livestock overpopulation led to range degradation as well as human conflict. *Id.* at 732. Federal policy nevertheless did not yet change on the public lands.

The depression of the 1930's, combined with drought and "dust bowl" conditions, pushed Congress to act. *Id.* at 733. Cattlemen encouraged and supported basic federal regulation of the rangelands, and the result was the Taylor Grazing Act of 1934 ("TGA"), 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315-315r (2006)). The TGA had three purposes:

- regulation of the occupancy and use of the public rangelands,
- protection of the public rangelands from harm, and
- stabilization of the livestock industry.

48 Stat. 1269; *see also Public Lands Council v. Babbitt*, 167 F.3d 1287, 1290 (10th Cir. 1999), *aff'd* 529 U.S. 728,

733 (2000). Another court found that the purpose of the TGA is "to stabilize, preserve, and protect the use of public lands for livestock grazing purposes." *Barton v. United States*, 609 F.2d 977 (10th Cir. 1979). The "Act was intended to address . . . the need to stabilize the livestock industry by preserving ranchers' access to the federal lands in a manner that would guard the land against destruction." *Public Lands Council v. Babbitt*, 167 F.3d at 1290. The Secretary of the Interior ("the Secretary") was to create grazing districts from among the public domain used for grazing and to determine the amount of grazing to be permitted in each district. 43 U.S.C. §§ 315, 315a and 315b; *see also Public Lands Council v. Babbitt*, 529 U.S. at 733. Grazing districts were to "promote the highest use of the public land, pending its final disposal." 43 U.S.C. § 315.

The Secretary established thirty-seven grazing districts encompassing 140 million acres. *Id.* at 734. The TGA expressly withdrew the land reserved in a grazing district from all forms of entry and settlement. 43 U.S.C. § 315. Inclusion of public land into a grazing district therefore reserved that land for grazing and "the primary use of that land should be grazing." *Public Lands Council v. Babbitt*, 167 F.3d at 1308. To individual ranchers within grazing districts, the Secretary would issue permits to graze livestock within those districts. 43 U.S.C. § 315b.

> Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, or leased by them. . . .

Id. In order to issue those permits, the Secretary had to determine the grazing capacity of each district and then "adjudicate" the grazing rights among range users. *Public Lands Council v. Babbitt*, 529 U.S. at 733-734. He established rules to do this.

First preference for adjudicated grazing rights went to those ranchers who owned stock and "base property," which was private land or water rights (since water rights were a severed and separate estate from federal land), and who grazed public range during the five years prior to 1934. This first preference recognized the fact that many ranchers would keep livestock on their private land part of the year and graze public land the remainder of the year. *Id.* at 734. Second preference went to owners of "base property" which was nearby to the federal range, but who did not actually graze public lands in the prior five years. *Id.* The third preference went to "stock owners without base property, like the nomadic sheep herder." *Id.*

> [P]reference in obtaining grazing privileges was accorded to owners of land or water who could support their livestock during the seasons when they were off the grazing district, who required the federal lands in conjunction with their own [lands] to form an economic ranching unit, and who had used the range during the priority period.

Foss, at 63.

The preference right does not guarantee a certain level of grazing but it gives the holder the right to use the maximum amount of grazing that the range will support at any given time, up to the preference limit. Foss, at 63-64.

> The grazing preference served as a stabilizing force for the livestock industry and promoted orderly use of the range by guaranteeing permittees the right to graze a predictable number of stock on the public lands and by allowing them to gauge how large or small their livestock operations could be.

Public Lands Council v. Babbitt, 167 F.3d 1287, 1310 (10th Cir. 1999) (Tacha, J., dissenting), *aff'd* 529 U.S. 728 (2000).

> Possession of a grazing preference attached to qualified base property guaranteed a rancher in possession of a permit the right to graze forage up to the amount specified by the preference so long as forage was available . . . and provided them with the certainty that if forage were abundant, grazing up to their preference limit would be authorized.

Id. at 1311. Once established, the grazing preference "is to be regarded as an indefinitely continuing right." *Shufflebarger v. Commissioner*, 24 T.C. 980, 992 (1955) (regarding Forest Service preference right).

Once the adjudications were completed, the Secretary was obliged to "safeguard[ ]" the "grazing privileges recognized and acknowledged . . . [s]o far as consistent with the purposes and provisions of this Act." 43 U.S.C. § 315b. The Secretary has the "affirmative obligation to adequately safeguard" grazing privileges of a preference holder. *Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949). The Tenth Circuit in *Oman* held that the owner of a grazing preference could sue Interior employees under the Federal Tort Claims Act for "wrongfully aid[ing], allow[ing], and encourag[ing] other livestock operators to utilize the public domain" to which the plaintiffs had preference

rights. *Id.* at 739. While the Secretary has specific authority under the TGA to modify grazing preference, "[a]s long as the permits were unrevoked, [he] would have no more right to interfere with their exercise than would any third party." *Id.* at 742.

In *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938), the District of Columbia Circuit allowed an injunction action to proceed against the Secretary in order to preclude an exchange of public lands that would cut off Red Canyon Sheep Company's grazing preference under the TGA.

> We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress.

Id. at 315. Recently, the Supreme Court confirmed the Secretary's responsibilities to "adequately safeguard" the grazing privileges of ranchers under the TGA:

> Given the broad discretionary powers that the Taylor Grazing Act grants the Secretary, we must read that Act as here granting the Secretary at least ordinary administrative leeway to assess 'safeguard[ing]' in terms of the Act's other purposes and provisions.

Public Lands Council v. Babbitt, 529 U.S. at 742.

While the TGA provided management for grazing federal lands "pending [their] final disposal," 43 U.S.C. § 315, Congress in 1976 decided that those same lands

would remain under federal ownership and management in perpetuity. 43 U.S.C. § 1701(a)(1). In enacting the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1784, Congress required the Department of the Interior to take many new steps in the care and management of federal lands, now that they were not to be disposed of, *e.g.*, inventories and classifications, 43 U.S.C. § 1711, land use planning, 43 U.S.C. § 1712, and wilderness assessment, 43 U.S.C. § 1782. However, Congress left the TGA largely intact and reaffirmed the adjudications of grazing rights on lands administered by BLM, requiring (in most cases) grazing permits to be issued for ten years, 43 U.S.C. § 1752(a), giving existing permit holders first priority for renewal of their grazing permits, 43 U.S.C. § 1752(c), and requiring two years advance notice before cancellation of a grazing permit where lands are withdrawn from grazing use, 43 U.S.C. § 1752(g).

Therefore, the TGA remains in effect after the enactment of FLPMA thirty years ago. Certain procedures have been mandated by FLPMA but the rights and privileges granted and guaranteed by the TGA are still viable. FLPMA added a multiple use paradigm on top of the primary purpose of grazing for lands within TGA grazing districts. *See* 43 U.S.C. § 1732(a) ("The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him" under 43 U.S.C. § 1712).

Congress also enacted the Public Rangelands Improvement Act ("PRIA"), 43 U.S.C. §§ 1901-1908, in 1978 in order to "manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values." 43 U.S.C. § 1901(b)(2). PRIA also reaffirmed that public rangelands

shall continue to be managed under the TGA, as well as FLPMA. 43 U.S.C. § 1903(b).

C. The Basics of Public Lands Ranching in the West

"Public lands ranchers" in the West are those who use a mix of lands in their livestock operations, which includes land owned by the federal and/or state governments. Frequently, a Western ranch will include a combination of privately-owned (deeded) lands, BLM-administered federal lands, and state lands.[2] Many public lands ranches will also have a Forest Service permit for seasonal grazing of livestock on forest lands. Other public lands ranches may include permits or leases for reclamation lands, military lands, lands of other federal enclaves, or even tribal lands. All of these lands are managed by the rancher as a ranch unit.

The private, deeded land in a ranch unit is typically the better land, containing perennial water sources (access to streams or ponds, springs or groundwater wells), or including good grazing land or having natural advantages of terrain, access to highways, and the like. The private land many times originated as a homestead entry or was obtained through another of the Congressional

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[2] State lands are those granted by the United States to newly-admitted states in order to provide income for state government operations. *See, e.g.*, for New Mexico, grant of lands under the Ferguson Act, 36 Stat. 484 (1898) and the New Mexico-Arizona Enabling Act, 36 Stat. 557 (1910). Due to abuses in the use and sale of lands in earlier state grants, Congress placed express trust restrictions on the grants to a number of the Western states. *See, e.g.*, *Lassen v. Arizona*, 385 U.S. 458, 459-464 (1967).

acts allowing settlement of the West. *See* Coggins, at 4-22, for a good discussion of the various means attempted by Congress to induce settlers. The ranch house and other essential ranch buildings are usually on the private land as well.

Water sources (springs, wells, and earthen tanks) are scattered strategically throughout the ranch unit, designed primarily to provide water to livestock as they graze in the various pastures on the ranch. The days of simply turning cattle out on the range are fading. Many, if not most, ranchers now employ various methods of rotation of pastures in order to control utilization of livestock forage to facilitate its growth and viability. A good rancher knows all of his or her grasses, forbs and other palatable forage, knows when and how they grow, and manages livestock to maximize the forage value to them, while maintaining good plant vigor and reproduction.

Common improvements on leased lands (federal, state and other) within a ranch unit include roads, fences, water tanks, windmills and pens for holding cattle. These improvements must be spread throughout the ranch in order to adequately feed, water, move and control the livestock. Federal and state laws require approval of the placement of permanent improvements on their lands. *See*, *e.g.*, 43 U.S.C. §§ 1752(g), 1702(k). Few Western ranches have free-flowing, perennial waters, so most ranchers must construct (and constantly maintain) earthen tanks, to catch surface flowing waters, and windmills or other wells, to pull deep groundwater to tanks on the surface. Cattle require substantial amounts of water every day.

A fully-deeded Western ranch is a rarity and mixed ownership is the norm. Frequently, ranches have only a small amount of private land. Under the TGA, private

land or water adjacent to federal lands is required in order to qualify for the lease or permit. *See* 43 U.S.C. § 315b. Respondent Robbins' ranches are somewhat rare, in that they have a high percentage and amount of private land, over 80,000 acres and about half of all of the lands within the entire ranch units. *See* JA 136 (map of Robbins' ranches). The BLM public lands are shown in yellow, with BLM grazing allotment boundaries delineated with green lines. Robbins' private lands are shown in orange, state (Wyoming) lands are in blue, and private lands other than Robbins' in white. As with many Western ranches, Robbins holds a U.S. Forest Service permit to take cattle into the forested high country rangelands in warmer months. The forest lands are to the west of Robbins' ranches and are clearly seen in solid green on the left side of JA 136. This is a common practice in Western public lands, where the private lands and BLM federal lands tend to be in the lower country and Forest Service lands in the higher, more mountainous country. This mix of lands allows a public lands rancher to move livestock frequently around the various pastures and ranges within the ranch unit, using grasses and other forage where it is seasonally available and avoiding overuse in any particular area. Under this type of management, cattle spend the warmer months in the cooler, wetter high country and the cold months in the low country where they are more easily kept together, fed and protected from cold, harsh weather. Robbins' cattle winter on the lowlands in the East and West Cottonwood pastures (in the left central area of JA 136) and the cattle are moved to summer pasture at Rock Creek and on Forest Service land (at the far left center of JA 136). The map clearly shows the mix of land ownership within Robbins' ranches. Private land in these ranches concentrates along rivers and creeks, and is clearly displayed on

JA 136 within the Wagonhound allotment in the center of the map with the Lower Lodge in the middle along the Cottonwood Creek.

The general mix of land ownership in a typical Western ranch is not as the Petitioners represent it. They imply that *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), is representative of the "complex checkerboard of intermingled parcels of federal, state, and private lands." Petitioners' Brief at 2. They cite *Leo Sheep* several more times in their Brief and cite no other case as an example of mixed land ownership within Western ranches. The situation before this Court in *Leo Sheep* was, in fact, atypical of the Western public lands ranch. The "checkerboard" pattern of federal/private land ownership is almost unique to the railroad grants, because of the unusual land transfer method chosen by Congress for those grants.[3] This pattern is not typical in the West because the "checkerboards" are found only where railroad grants were made, whereas typical public lands ranches contain a much more random mix. Respondent Robbins' ranch is nowhere near the "checkerboard" railroad grants, nor does the map of his ranch look like a checkerboard. *See* JA 136.

The relevance of the government's reliance on *Leo Sheep* is in the inevitable consequences of the railroad grants. "Because of the checkerboard configuration, it is physically impossible [to access federal land] without some minimum physical intrusion upon private land." 440 U.S. at 678. Even in the face of this fact, this Court in *Leo*

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[3] As noted in *Leo Sheep*, the federal grant was of every odd-numbered section within twenty miles on both sides of the railroad track laid through Wyoming and other states. The United States retained the even-numbered sections.

Sheep refused to imply an easement which Congress did not expressly provide in the granting statute. In the instant case, it is not impossible for federal lands to be accessed due to the pattern of land ownership. The map, JA 136, shows the federal lands to be accessible in a number of ways. The random ownership pattern of the typical Western public lands ranch makes each ranch's issues regarding road and access patterns unique.

Public lands ranching has allowed good uses of federal lands that otherwise would have never occurred, making those lands productive for food for the nation. *See Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938) (TGA "is designed to provide for the most beneficial use possible of the public range in the interest . . . of the public at large. The livestock industry of the West is an important source of food supply for the people of the nation"). Since the BLM-administered federal lands are the lands that went unreserved for special federal purposes and unclaimed for private ownership, they tend to be the more remote and least productive of the federal, and perhaps all Western, lands. *See* Coggins, at 20-22. Many federal lands are too far from any productive uses other than ranching. The TGA and FLPMA have afforded these lands a useful purpose to the nation through inclusion in public lands ranches. *United States v. Fuller*, 409 U.S. 488, 495 (1973) ("[G]razing permits are of considerable value to ranchers and serve a corresponding public interest in assuring the 'most beneficial use' of range lands") (5-4 decision) (Powell, J., dissenting).

The sale of a public lands ranch frequently involves deeding of the private land, transferring the BLM allotment permit, conveying the state lease, transferring the forest permit, conveying easements and rights-of-way,

deeding or conveying water rights, and granting a bill of sale for the livestock and the non-permanent improvements, vehicles and equipment. It is rarely a simple transaction and takes some time to complete. Respondent Robbins went through this type of process when he acquired his ranches in the 1990's, and he also had to transfer special recreation use permits from BLM.[4]

Public lands ranches provide employment and economic opportunity throughout the West and particularly in rural areas dominated by federal lands. J.M. Fowler, D. Rush, J.M. Hawkes, and T.D. Darden, *Economic Characteristics of the Western Livestock Industry* (1994). They "contribute significantly to the local economics" of Western counties, like those which are members of *Amicus Curiae* Coalition of Arizona/New Mexico Counties for Stable Economic Growth. *Id.* at 44. In many Western states, the economic effects of public lands ranches are pervasive because those ranches are generally spread throughout the states' areas. A 1994 study estimated that the direct expenditures in local economies by ranchers using federal lands for grazing were over $800 million, without accounting for any multiplier effects. *Id.* at 2.

[4] Some Western ranches have side businesses offering hunting and fishing and other recreation, but most do not. There are only so many customers for real-life ranching recreation.

II. WHILE THE BLM AND ITS AGENTS HAVE BROAD AUTHORITY TO MANAGE THE PUBLIC LANDS, THEIR AUTHORITY AND DISCRETION ARE STILL LIMITED

Congress has plenary authority over federal lands under the Constitution's Property Clause. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Congress has delegated much of that authority, in broad terms, to BLM for many of the federal lands. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). All administration of federal lands by BLM is tempered by the laws Congress enacted to direct, authorize and guide this agency. *See Public Lands Council v. Babbitt*, 529 U.S. 728 (2000) (regarding constraints upon grazing regulation imposed by TGA and FLPMA, and their regulations); *Hatahley v. United States*, 351 U.S. 173 (1956) (regarding requirements of federal agents to comply with the law and to follow their agency's regulations).

The Taylor Grazing Act creates a balance between federal landlord authority and private rights and/or privileges. Congress gave BLM the basic rules by which to determine preference, and thereby did not grant complete authority or discretion in BLM to make these decisions. 43 U.S.C. § 315b. Those who qualify for preference have the right to enforce it. *McNeil v. Seaton*, 281 F.2d 931 (D.C. Cir. 1960). Once established, preference rights must be protected by BLM ("adequately safeguarded," per 43 U.S.C. § 315b) and can even be enforced against BLM itself. *See Oman v. United States*, 179 F.2d 738 (10th Cir. 1949); *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938). The Tenth Circuit in *Oman* effectively summarized one aspect of the limited grant of authority to federal agents:

> No government employee is granted the discretion whether he shall induce or incite third persons to interfere with exclusive rights or privileges granted by the United States.

Id. 179 F.2d at 740. That Court also relied heavily upon the procedural protections built into the TGA to protect grazing preference holders had the government officials indeed taken proper action ("[h]ad such steps [the discretionary authority to revoke or cancel plaintiffs' exclusive grazing privileges] been taken, the plaintiffs would have been afforded procedural safeguards which apparently were not available to them here"). *Id.* The District of Columbia Circuit recognizes that the grazing allowed under a permit resulting from TGA preference rights "make[s] that privilege a proper subject of equitable protection against an illegal act" by a government official. *Red Canyon Sheep Co.*, 98 F.2d at 316.

Even BLM in the instant case recognizes the strict limitations on its authority and does not claim that BLM (as opposed to Congress) has plenary authority over the federal lands it manages. *See* Brief for the Petitioners at 3. In fact, the Petitioners hinge most, if not all, of their claims upon their ability to receive a "reciprocal" right-of-way from a private landowner/grazing preference holder like Respondent Robbins.[5] Brief for the Petitioners at 3-4, 14-15, 17, 25-26, 28-30, 32, 40-41, 47-48 and 52-57.

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[5] As detailed in Respondent's Brief, this case does not involve the granting of mutually "reciprocal" rights-of-way because Robbins would not receive a right-of-way from BLM that is equivalent to the one BLM demands from him. *See* 43 C.F.R. § 2801.1-2; *Charles Ryden*, 119 I.B.L.A. 277, 279 (1991) (BLM cannot require from a rancher a general public easement across private property where BLM's "reciprocal" easement was not equivalent in nature).

Instead, the Petitioner BLM officials attempted to force Robbins to convey private property, an easement or right-of-way, to BLM as a condition unrelated to the proper exercise of their authority under the TGA, FLPMA or any other law. There is no such authority in any statute to require a preference holder/permittee to provide the government a free easement or right-of-way. Similarly, BLM and its employees lack any inherent authority to require this type of conveyance. *See Flint Ridge Devel. Co. v. Scenic Rivers Assoc. of Oklahoma*, 426 U.S. 776, 787 (1976).

A federal "agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. Federal Commun. Comm'n*, 476 U.S. 355, 374 (1986). The executive branch of government has no authority to administer a law "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). This Court in *ETSI* prohibited the Secretary of the Interior from approving a contract under the Flood Control Act of 1944 because the Act gave him no powers to do so. As a corollary to this rule, "[a]n agency cannot confer power upon itself" that is lacking in the pertinent Congressional enactment since this would allow the agency to "override Congress." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374-375.

While the Secretary of the Interior has broad discretion in FLPMA in managing and protecting BLM lands and resources, that discretion is "not unlimited." *Sierra Club v. Andrus*, 487 F.Supp. 443, 448 (D.D.C. 1980), *aff'd Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981). "43

U.S.C. §§ 1701 and 1782(c) . . . do not confer absolute discretion upon the Secretary" and "these provisions indicate a congressional intent to set some limit on the Secretary's discretion." *Id.* at 449. The Court in *Sierra Club* held that these two FLPMA provisions:

> . . . would be meaningless if they did not limit the Secretary's discretion in following the general operational directive to manage, protect, and administer the relevant resources in accordance with enunciated statutory standards.

Id. While the TGA is silent on the issue, FLPMA grants BLM the power of eminent domain in extremely limited situations. *See* 43 U.S.C. § 1715(a). This provision authorizes purchase, exchange and donation as acquisition methods before the statute lists eminent domain. Then, the Secretary may use eminent domain "only if necessary to secure access to public lands, and then only if the lands so acquired are confined to as narrow a corridor as is necessary to serve such purpose." *Id.* Thus, BLM's power to exercise eminent domain is exceedingly confined. What this means in the instant case is that BLM's options to acquire access were by consent or cooperation. BLM and the Petitioners did not seek to acquire rights-of-way from Respondent Robbins by any of the methods allowed by FLPMA. Instead, they attempted to coerce a right-of-way from Robbins through what the Petitioners recognize could be interpreted as "aggressive" or "overzealous regulation" (Petitioners' Brief at 18, 20). Neither FLPMA, TGA nor any other law grants these federal employees the express or inherent power to coerce a private property owner into signing over an easement or right-of-way to the government.

Respondent Robbins recites other actions taken against him in the pattern of harassment and coercion conducted by BLM employees. They revoked his grazing permits and grazing preference, revoked a right-of-way to cross BLM lands, revoked his special recreation use permit, filed false criminal charges against him, trespassed on his private property, filed frivolous livestock trespass charges against him, harassed his ranch visitors and guests, and failed to comply with agreements entered into with Robbins. While BLM employees may have the "lawful regulatory authority" (*id.* at 14) to engage in these general types of activities, they can only do so for legitimate purposes. *See Hatahley v. United States*, 351 U.S. 173, 181 (1956). Under the TGA and FLPMA, legitimate purposes would include actions designed to protect range resources and regulate their uses. Petitioners did not have the proper motives in mind when they undertook improper actions to coerce Robbins into granting an easement to BLM. Federal employees cannot rely upon the result justifying the means. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999), *aff'd* 529 U.S. 728 (2000) ("[p]ermissible ends ... do not justify unauthorized means," in the Tenth Circuit holding that Secretary lacks authority to issue grazing permits solely for conservation purposes). All citizens have the right to expect a high standard of conduct from their public officials. "[L]aw enforcement officers are held to a higher standard of conduct than are other federal employees." *Watson v. Dep't of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995).

Petitioner BLM employees also charged Robbins administratively with livestock trespass on multiple occasions, including for grazing livestock on his own land.

Under FLPMA regulations, to impose monetary penalties for livestock trespass the acts must be proven to be "willful." 43 C.F.R. § 4150.3. Other penalties for willful trespass are more serious, including the elimination of all grazing privileges. 43 C.F.R. § 4170.1-1. A "willful" trespass requires a showing that Robbins intentionally or recklessly grazed his livestock on public land without authorization from BLM. *John L. Falen*, 143 I.B.L.A. 1, 5 (1998). Robbins, unrepresented by counsel, was induced by the Petitioners to "settle" willful trespass charges based on false statements and threats. As a result, Robbins has lost his grazing preference and privileges on BLM lands.

Petitioners have "lawful regulatory authority" (Petitioners' Brief at 14) to take trespass actions against offending ranchers under FLPMA and its regulations. However, the facts upon which they based trespass actions against Robbins were known to be false. Moreover, Petitioners' motives were to punish Robbins, not to regulate use of the range, and to obtain something from Robbins that the government was not entitled to get. Flatly stated, BLM officials do not have the authority to regulate, or negotiate, for improper purposes.

A government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers. *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986). They also lack "inherent authority" to change statutory procedural requirements. *Flint Ridge Devt. Co. v. Scenic Rivers Assoc. of Oklahoma*, 426 U.S. 776, 787 (1976). Internally, the Department of the Interior recognizes that ranchers must be "dealt with fairly" by BLM. *See Hugh A. Tipton*, 55 I.B.L.A. 68, 73 (1981); *Colvin Cattle Co., Inc.*, 39 I.B.L.A. 176, 180 (1979).

Congress conferred wide-ranging powers upon the Secretary of the Interior and his subordinates to carry out the important public purposes of the TGA, FLPMA, PRIA and the other public land laws. Those laws incorporate the protection of and respect for American citizens and their private property that are embedded in the Constitution and all other laws. Persons regulated by and contracting with agencies such as BLM have the right to expect government employees to act even-handedly and to "play by the rules." Government officials must abide by the Constitution and laws of the United States and the rules and procedures of the agency for whom they work. *See Hatahley*, 351 U.S. at 178 ("The [Range] Code is, of course, the law of the range, and the activities of federal agents are controlled by its provisions"). There is absolutely nothing in the TGA or FLPMA, or any other governing federal law, that would allow a federal official to regulate or act arbitrarily or for improper motive or purpose.

CONCLUSION

Amici Curiae urge the Supreme Court to affirm the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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